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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Catch-525(b)

Dear Ms. Dortch:

“Permissionless innovation” does not appear in the NPRM for this proceeding, but the words are buzzing in the background.¹ The phrase has become fairly commonplace in discussions of telecommunications policy. It was a favorite talking point for then-chairman Thomas Wheeler during the debate over reclassification of Internet access service. The Republican appointees also embraced the concept,² if for no other reason than to mock the Democrats for thinking that the best way to realize the benefits of permissionless innovation was subjecting ISPs to a set of 1930s-era regulations under which the most compelling consumer-product innovation during a period of over 60 years was the multi-colored princess telephone.

In May of last year, Commissioner Michael O’Rielly, a big fan of American capitalism,³ broke new ground by calling for extension of the principle beyond the Internet-related economy to the broadcast industry. He challenged the FCC to “strike barriers from the Commission’s existing rules and set in place a structure whereby the broadcast industry can adopt future

¹ The essence of the principle of “permissionless innovation” is succinctly stated by the question posed by Adam Thierer’s book *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom*: “Will innovators be forced to seek the blessing of public officials before they develop and deploy new devices and services, or will they be generally left free to experiment with new technologies and business models?” <https://www.mercatus.org/publication/permissionless-innovation-continuing-case-comprehensive-technological-freedom>. Thierer is a Senior Research Fellow with the Technology Policy Program at the Mercatus Center at George Mason University.

² See, e.g., Statement of FCC Commissioner Ajit Pai Before the Subcommittee on Financial Services and General Government of the United States House of Representatives Committee on Appropriations, Budget Hearing—Federal Communications Commission, Mar. 24, 2015, at 3, https://apps.fcc.gov/edocs_public/attachmatch/DOC-332675A1.pdf (“permissionless innovation . . . has spurred the Internet’s explosive growth”); Steve Danes & Michael O’Reilly, Opinion, *FCC, May I Please Innovate*, *Forbes*, Jan. 20, 2016, <https://www.forbes.com/sites/realspin/2016/01/20/fcc-innovation-net-neutrality/#1be73d2a72e4>; Testimony of FCC Chairman Ajit Pai before the Senate Committee on Commerce, Science and Transportation, Oversight of the Federal Communications Commission, Mar. 8, 2017, http://www.tellusventure.com/downloads/fcc/2017/pai_testimony_senate_8mar2017.pdf.

³ See Michael O’Rielly, *Defending Capitalism in Communications*, FCC Blog, Feb. 2, 2016, <https://www.fcc.gov/news-events/blog/2016/02/12/defending-capitalism-communications> (“American capitalism, and its role in the communications industry, should be embraced, celebrated, and exported throughout the world.”)

changes and potentially future standards without the Commission's involvement."⁴ After Republican appointees became a majority of the FCC's members in January, broadcasters, who recognize a good marketing slogan when they see one, wasted little time in complaining about being "hamstrung by the lack of permission-less innovation."⁵

So, when this proceeding began, the Commission's majority and the broadcast industry were both on board the permissionless-innovation bandwagon.⁶ Indeed, even some of those who question the wisdom of giving broadcasters conditionless permission to introduce ATSC 3.0 felt the need to preface their remarks with an oath of fealty to the concept.⁷

To borrow from Captain John Yossarian, the protagonist in Joseph Heller's World War II novel, *Catch-22*, since just about everybody who has or wants influence over telecommunications policy believes permissionless innovation to be a good thing, we'd be fools to think any other way.⁸

And yet, we cannot help but quibble just a bit in light of some lessons to be learned from that book's subplot about the black-market empire of Lieutenant Milo Minderbinder, the mess officer for the Army Air Corps' 256th Squadron stationed on the fictional Mediterranean island of Pianosa.

Minderbinder viewed the Second World War not as a just cause, an abomination, a tragedy or even, like Yossarian, a mortal danger, but, rather, as a financial opportunity. He began his profiteering modestly, buying foodstuffs cheaply on local and regional markets and selling them to his squadron's mess hall. Soon, he branched out to pursue a wide range of lucrative deals across the globe on behalf of a "syndicate" in which he gave a "share" to just about everybody participating in the world economy, including the Nazis.⁹ Although an officer

⁴ Michael O'Rielly, Keynote Address at Annual Broadcast Television Convergence of the Advanced Television Systems Committee, May 11, 2016, https://apps.fcc.gov/edocs_public/attachmatch/DOC-339330A1.pdf.

⁵ John Eggerton, *FCC's Pai Proposes ATSC 3.0 Rollout*, B&C, Feb. 2, 2017, <http://www.broadcastingcable.com/news/washington/fccs-pai-proposes-atsc-30-rollout/163020>.

⁶ Ironically, on December 17, 2015, Commissioner Pai tweeted that "The era of permissionless innovation is over." <https://mobile.twitter.com/AjitPaiFCC/status/677566977540554752>. As it turned out, the report of its demise was greatly exaggerated.

⁷ See Comments of The American Television Alliance, GN Docket No. 16-142, at 1 (filed May 9, 2017) ("ATVA members support the idea of allowing broadcasters to engage in 'permissionless innovation.'").

⁸ Often, after saying something contrary to conventional wisdom, Yossarian would be asked "What if everyone thought that way?" His standard answer was "I'd be a damn fool to think any other way."

⁹ The syndicate was so wildly successful that grateful members bestowed numerous honors upon Milo—he became the mayor of Palermo, the Assistant Governor-General of Malta, the Vice-Shah of Oran, the Caliph of Baghdad, the Imam of Damascus and the Sheik of Araby. He was also worshipped as a god in numerous polytheistic societies. His counterparts in the broadcast industry who have been securing double-digit increases in retrans fees for over a decade, receive more mundane, but still impressive rewards (ultimately paid for by MVPD subscribers) such as millions in stock options and cash bonuses. Some of them have also achieved god-like status in board rooms and other settings where the dollar is worshipped.

in the U.S. armed forces, he was allowed free rein to pursue his schemes by his superiors, who had shares in the syndicate. He thrived in an atmosphere of permissionless innovation, coming up with all sorts of creative ways to profit.¹⁰

They say necessity is the mother of invention, and Milo had one of his most notable brainstorming sessions when he had the bad luck of cornering the supply of Egyptian cotton on the eve of a worldwide cotton glut. Fearing bankruptcy for the syndicate, Milo came up with the idea of covering cotton bolls with chocolate and selling them as a dessert to Army mess halls.¹¹

So, although permissionless innovation sometimes gives us iPhones, it is also capable of serving up chocolate-coated cotton bolls. An assumption, usually unspoken, of fans of permissionless innovation is that the principle plays itself out in a market which, to borrow Commissioner O’Rielly’s words, takes the form of a “voluntary arrangement in which buyers and sellers are free to conduct transactions as they see appropriate.”¹² In that sort of market, nobody would eat Milo’s concoction, and so the syndicate would eat a large loss and discontinue production.

Milo, though, operated in a much different kind of market. First of all, he controlled both the seller and the buyer sides. Because he was given a free hand in running the mess hall on Pianosa, he could see to it that the budget for desserts was spent on his invention instead of something more palatable. Second, the ultimate consumers could not register their distaste for the chocolate-covered cotton in any economically meaningful way. The very same government which allowed Milo to implement his ideas without permission forced the soldiers in the 256th Squadron to serve in the military on Pianosa and dine in the mess halls, whether they wanted to or not. While they could decline to actually eat Milo’s culinary creation, that decision at the “retail” level was not capable of influencing the behavior of either the “wholesaler” (the mess halls Milo controlled) or the producer (the syndicate which Milo controlled). Innovation, even

¹⁰ One of Milo’s creative ideas was contracting with the Germans to bomb the 256th Squadron’s gasoline and ammunition stockpiles using the squadron’s own planes and pilots. The Germans, he reasoned, were going to bomb anyway, even if they had to use the German air force, and so by “eliminating the middleman,” Milo could give the Germans what they wanted at a lower cost. Milo almost went too far with this transaction, which initially generated an outpouring of outrage in the press and Congress. Milo responded by opening the syndicate’s books to show the size of the profit earned from the deal and the criticism melted away. On another occasion, Minderbinder, learning that the Allies were going to bomb a bridge at Orvieto, contracted to conduct the attack for them. At the same time, he got the Germans to hire him to defend the bridge with anti-aircraft guns. Once he had the contracts in hand, Milo convinced the Allies to supply him with the planes needed for the bombing run and the Germans to provide the anti-aircraft guns for defending it—after all, both sides had shares in the syndicate. From the perspective of capitalist economic theory, there is absolutely no basis for finding fault with either transaction. See Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, The New York Times Magazine, Sept. 13, 1970, <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>.

¹¹ Eventually, Milo was persuaded by Yossarian to bribe the U.S. government to buy the cotton from him, sarcastically advising him: “If you run into trouble, just tell everybody that the security of the country requires a strong domestic Egyptian cotton speculating industry.”

¹² Michael O’Rielly, *Defending Capitalism in Communications*, FCC Blog, Feb. 2, 2016, Michael O’Rielly, *Defending Capitalism in Communications*, FCC Blog, Feb. 2, 2016, <https://www.fcc.gov/news-events/blog/2016/02/12/defending-capitalism-communications>.

though permissionless, was not coercionless. Because externalities prevented the market from functioning optimally, resources which in a competitive market would quickly be diverted to producing something people actually wanted continued to be wasted on a product for which there was no real demand.

Another way of making these points about permissionless innovation is to consider the words of a real-life entrepreneur. In a letter to shareholders last year, Jeff Bezos, Amazon's founder and CEO, remarked that "failure and invention are inseparable twins. To invent you have to experiment, and if you know in advance that it's going to work, it's not an experiment. Most large organizations embrace the idea of invention, but are not willing to suffer the string of failed experiments necessary to get there."¹³ The main focus of his observation is on the tendency of established companies to avoid innovation because of fear of failure, but inherent in his words is the notion that if a company does introduce something new, we cannot say it was a success if, because of market externalities, failure was never a possibility in the first place.

Mr. Bezos' letter also contained the boast, at first glance seemingly unfavorable to his company, that "Amazon is the best place in the world to fail." What he meant is that Amazon is a nearly perfect example of a classic competitive market of the kind Commissioner O'Rielly admires so much. Literally thousands of sellers and legions of buyers freely and voluntarily interact, with any given product facing competition from a host of close substitutes. Innovation is both permissionless for the seller and coercionless for the buyer, with the fate of each new or improved product being determined solely by the independent, voluntary decisions of millions of individuals.¹⁴ The need to compete for sales leads firms to develop new technologies, products and services and, at the same time, the judgments rendered by consumers ensure that resources will not long be wasted on inventions for which there is insufficient demand. As Mr. Bezos understands very well, both elements are critical—socially optimal results will not be achieved if there are market conditions that make product failure impossible or unlikely.

The buyer side of the market for broadcast television corresponds much more closely to that for chocolate-coated cotton bolls on Pianosa than to that for chocolate-covered potato chips on Amazon.¹⁵ The vast majority of American households—the "retail" buyers of broadcast TV—choose to receive their local stations through an MVPD—the "wholesaler." In today's market, large station group owners compel delivery of all stations carried by an MVPD to all subscribers, including those who would decline to buy a channel at an equivalent price if given a choice. Their power to do so derives from either special privileges enjoyed under the Communications

¹³ Jenna McGregor, *Why Jeff Bezos Says Amazon is "the best place in the world to fail,"* The Washington Post, Apr. 6, 2016, https://www.washingtonpost.com/news/on-leadership/wp/2016/04/06/why-jeff-bezos-says-amazon-is-the-best-place-in-the-world-to-fail/?utm_term=.17420c3427c3.

¹⁴ Thierer's book, *Permissionless Innovation*, has a sales ranking of 1,613,971 in Books, 10,792 in Science and Math: Technology and 58,618 In Engineering & Transportation: Engineering. If published by Milo's syndicate, its rankings would be much higher because millions of military personnel would be forced to buy it. *Catch-22*, by contrast, comes in at 1,091 on the Amazon sales ranking. See <https://101books.net/2015/05/15/times-100-novels-ranked-by-amazon-sales>.

¹⁵ See https://www.amazon.com/Chocolate-Covered-Sanders-Fine-Chocolates/dp/B00BMBVXRK/ref=sr_1_1_a_it?ie=UTF8&qid=1496327470&sr=8-1&keywords=sanders+fine+chocolates+potato+chips.

Act of 1934, as interpreted and implemented by the Commission, or leverage in retransmission consent negotiations because of their local monopolies over “must-have” programs. Moreover, due to FCC forbearance and the market power of the owners of the most popular broadcast and non-broadcast content, MVPDs have no practical choice but to offer video services in bloated bundles which they have little or no ability to disaggregate or even shrink.

The result is to all but eliminate consumers’ ability to influence the prices or behavior of those who control video content. Subscribers do not know the price they pay for watching network programs on a particular local station.¹⁶ If a subscriber knew and thought the price too high, he would not have the ability to stop paying for that station alone. Instead, his only option would be to cancel his entire pay-TV subscription and lose access to other broadcast stations and his favorite non-broadcast networks.

So, if Commissioner O’Rielly’s goal were realized and innovation became permissionless for broadcasters but was not also made coercionless for consumers, the net result would be a situation very much like that existing on Pianosa, where mess halls had no practical choice but to buy Milo’s culinary abomination and serve it to their captive patrons. In both cases, it would be possible for an “innovation” for which there was little demand to continue to be sold because the producer would not be subject to the collective judgment rendered through consumers’ independent buying decisions.

The same analysis is valid for this proceeding, even though the decision before the Commission is not whether to free broadcasters from the need for permission generally but, rather, the conditions, if any, to be attached if consent is given to implement what broadcasters’ marketers have dubbed NextGen TV. We do not know whether the broadcasters’ experiments would succeed or fail if conducted on a market like Amazon where buyers are free from coercion.

What we do know with absolute certainty, based on real world experience of most MVPDs in negotiating retrans deals for over a decade, is that powerful station owners, if granted permission to exploit ATSC 3.0 without conditions, will use retransmission consent as a club to force a large percentage of the 100 million households subscribing to pay-TV to receive and pay for NextGen TV offerings, whether they want them or not. Apart from that, merely introducing the technology is likely to result in costs for MVPDs and stations which will ultimately be borne by consumers. In each case, the sole choice for avoiding those costs available to consumers who conclude that the innovation is not worth the price of admission will be to drop all of their pay-TV channels.

Milo Minderbinder’s dream was to “see the government get out of war altogether and leave the whole field to private industry.” Today, there are many who would like to see the

¹⁶ See Letter, dated Sep. 23, 2003, to FCC from Consumers Union, at 4-5, *In the Matter of General Motors Corporation, Hughes Electronics Corporation, And The News Corporation Limited Application To Transfer Control Of FCC Authorizations And Licenses Held By Hughes Electronics Corporation To The News Corporation Limited*, MB Docket No. 03-124, <https://ecfsapi.fcc.gov/file/6515083656.pdf> (the bargaining leverage of owners of broadcast and sports channels allowing them to mandate delivery to all subscribers “effectively mutes, if not negates any demand elasticity”).

government get out of broadcaster regulation altogether. While Milo's idea has virtually no support, there are some smart people without a financial interest in the outcome who back permissionless innovation for the broadcast industry. Motivated by economic theory and an ideological preference for deregulation, they sincerely believe that when businesses are freed from the need for government consent to invent, technological progress and entrepreneurship will thrive, resulting in more efficient allocation of productive resources and greater selection and lower prices for consumers.¹⁷

If we assume that this is correct, it all works only in a competitive market where buyers have choices and those choices can be made free of coercion. To emphasize a point already made—and emphasis is necessary because, historically, the Commission has not seemed to get it: The market for retransmission consent is not that kind of market. Instead, it “plainly is not [efficient]” because it is subject to a number of significant externalities,¹⁸ including the laws, rules and broadcaster market power that force the vast majority of pay-TV subscribers to buy bundles of local stations regardless of whether they want all of them.

In these circumstances, it would be a mistake to give broadcasters conditionless permission to innovate around the ATSC standard unless subscribers were also given permission to pay only for the stations they want to buy. Or, as Mr. Bezos might say, in an efficient market, the right of broadcasters to innovate has to go hand in hand with the right of consumers to reject their inventions.

Accordingly, the FCC should neither stand in the way of NextGen TV nor give broadcasters carte blanche. Permission to implement ATSC 3.0 should be granted, but subject to carefully thought-out safeguards against the potential negative consequences for millions of Americans who have no practical choice but to buy whatever broadcasters put on the menu, even if inedible.

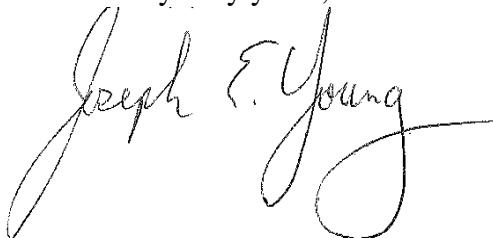
In conclusion, so long as the current legal rules and market structure remain unchanged, if the Commission gives broadcasters what they want, it will not be the consumer who will ultimately determine the success or failure of innovations flowing from the adoption of ATSC

¹⁷ Many proponents of deregulation argue for freeing broadcasters to innovate, but are strangely silent when it comes to freeing consumers from being forced to buy broadcast stations and whatever “innovation” broadcasters decide to introduce. It brings to mind another character from Heller's book, Colonel Cargill, who was assigned the task of getting a good turnout for a U.S.O. show. Finding that those stationed on Pianosa were less than eager to attend, Cargill called them together and said this: “I'd be the last colonel in the world to order you to go to that U.S.O. show and have a good time, but I want every one of you who isn't sick enough to be in a hospital to go to that U.S.O. show right now and have a good time, and that's an order!” Free market advocates at the FCC should be the last officials in the world to order consumers to buy broadcast stations whether they want to or not, but that is what they effectively do by not acting decisively to address laws, rules and market flaws that deprive pay-TV subscribers of meaningful choice over their channel lineups.

¹⁸ See T. Randolph Beard, George S. Ford, Lawrence J. Spiwak & Michael Stern, *An Economic Framework for Retransmission Consent*, Phoenix Center for Advanced Legal & Economic Public Policy Studies (2013), <http://www.phoenix-center.org/pcpp/PCPP47Final.pdf>.

3.0.¹⁹ Instead, the only market participants who will be free to make decisions about NextGen TV innovations on a voluntary, market-based basis²⁰ will be those very same broadcasters. As for the masses of subscribers yearning for comparable freedom, well, let them eat cotton.²¹

Very truly yours,

A handwritten signature in black ink, reading "Joseph E. Young". The signature is fluid and cursive, with the first name "Joseph" and last name "Young" being the most prominent parts.

¹⁹ In his Statement accompanying the NPRM in this docket, Commissioner O’Rielly says that “Ultimately, consumers will determine the future of television broadcasting.” As noted, pay TV subscribers don’t have the freedom to choose not to buy individual channels or even groups of channels. So, the only way that the vast majority of Americans can ever effectively register a thumbs-down to broadcast TV is by entirely cutting the cord. In competitive markets, consumers have much more of a role in determining product success or failure. For example, McDonald’s stopped selling its pricey Angus Burger in 2013 because of declining sales as tastes changed and McDonald’s customer base increasingly emphasized affordability. See Candace Choi, *McDonald’s cuts Angus burgers from menu*, USA Today, May 9, 2013, <https://www.usatoday.com/story/money/business/2013/05/09/mcdonalds-angus-burgers/2144785/>. Consumers could determine the burger’s fate because they were able to stop buying it without thereby losing something else they valued highly. Consider what would have happened, however, if McDonald’s had the legal right or sufficient market power to compel everyone who wanted to buy an iPhone to also buy an Angus Burger. That is a close approximation of how the market for broadcast TV works. As a cable subscriber, I cannot buy the linear ESPN or Turner Classic Movies channel without also buying a host of other channels I do not want, including local broadcast stations that I never watch. I value ESPN and TCM sufficiently that I reluctantly and unhappily pay for the other stuff, and so I have no effective way of registering my negative vote on “the future of television broadcasting” in general or with regard to any specific channel.

²⁰ Chairman Pai, in his Statement attached to the NPRM, says that what the Commission is proposing is a use of ATSC 3.0 on a voluntary, market-driven basis. Most MVPDs and objective observers of the retrans marketplace are in near-unanimous agreement that the only thing “driven” by the market are MVPDs driven to accept the outrageous price and other demands of broadcasters threatening shutoffs on the eve of marquee events. See Letter of Joseph E. Young, General Counsel, Mediacom Communications Corporation, GN Docket No. 16-142 (filed March 30, 2017), and the sources cited in notes 5-8 & 11. The market is not competitive and the outcomes produced are “voluntary” and “market-based” only in the same sense as deals based on offers made by Don Vito Corleone. Given the fact that the outcomes for consumers and society are radically different depending on whether or not the market is competitive, we respectfully submit that the Commission should not make decisions regarding ATSC 3.0, ownership limits and restrictions and other important matters based on assumptions about market functioning or reports produced by economists hired by parties with significant financial interests in the outcome. Instead, the Commission should undertake its own independent, objective study of the market and the process of negotiating retrans deals to determine if it is competitive and whether it is functioning consistently with congressional intent and goals. Similarly, before removing restrictions or requirements applicable to broadcasters, the Commission should have its economists independently assess the likely impact given actual market structure, including the fact that most consumers have no choice but to buy broadcast programming if they want non-broadcast channels and the certainty that broadcasters will use their leverage in retrans negotiations to force universal distribution and payment for their ATSC innovations. See Roslyn Layton, *Make the FCC a Great Place to Work Again*, Jan. 26, 2017, <https://www.forbes.com/sites/roslynlayton/2017/01/26/make-the-fcc-a-great-place-to-work-again/#191ae4e2290a>; Thomas W. Hazlett, *Economic Analysis at the Federal Communications Commission: A Simple Proposal to Atone for Past Sins*, Resources For The Future, May 2011, <http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-11-23.pdf>.

²¹ To give credit where due, the Statements of Chairman Pai and Commissioner O’Rielly attached to the NPRM in this proceeding indicate that they recognize some of the potential adverse consequences for consumers. Commissioner O’Reilly says, he wants to be sure “use of the new standard will be completely voluntary for all participants,” including MVPDs and consumers. Chairman Pai’s hope is that, “consumers will not be burdened with unwanted, unexpected costs.” Historically, however, the FCC has demonstrated no willingness to take steps, even those clearly within its authority, to protect consumers from being forced to buy channels they do not want or burdened with costs for retransmission consent far in excess of anything Congress anticipated or intended.